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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Attorney General is prohibited from considering the Nation's opposition to terrorism, and other foreign policy concerns, when he exercises his discretion to grant or deny asylum to an alien under Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. 1158(a).

2. Whether the Attorney General properly declined to reopen respondent's deportation proceedings to allow him to apply under Section 243(h) of the Act, 8 U.S.C. 1253(h), for withholding of deportation to the United Kingdom, on the ground that the existing record established that he would be ineligible for that relief under either of two statutory exclusions because he committed serious nonpolitical crimes in the United Kingdom and was actively involved in the Provisional Irish Republican Army, a terrorist organization.

3. Whether the Attorney General abused his discretion in concluding that respondent did not in any event identify changed circumstances or new and material evidence that warranted the reopening of his deportation proceedings to permit him to apply for asylum and withholding of deportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	1
Statement	2
Summary of argument	13
Argument:	
The Attorney General properly denied respondent's motion to reopen his deportation proceedings	16
I. The Attorney General did not abuse his discretion in denying respondent's motion to reopen on the ground that respondent would not in any event be granted asylum or withholding of deportation	18
A. The Attorney General properly considered the nation's opposition to terrorism and other foreign policy concerns in deciding that respondent is not deserving of the special humanitarian relief of asylum	18
1. The text of Section 208(a) and related provisions of the Act does not support the limitations the court of appeals placed on the Attorney General's discretion	20
2. This Court's decisions in *Cardoza-Fonseca*, *Stevic*, and *Abudu* refute the court of appeals' construction of Section 208(a)	23
3. The legislative history of Section 208(a) strongly supports the Attorney General's broad discretion to consider anti-terrorism and foreign policy concerns in asylum cases	28
4. The court of appeals should have deferred to the Attorney General's reasonable inpretation of Section 208(a)	32

Argument—Continued: Page

B. The Attorney General properly concluded on the uncontradicted record that respondent would be ineligible for withholding of deportation under either of two statutory exclusions from that relief 34

1. The Attorney General may deny reopening where the existing record shows that the alien falls within a statutory exclusion from eligibility for withholding of portation 34

2. The Attorney General did not abuse his discretion in concluding that the evidence in the record showed that respondent would be excluded from eligibility for withholding of deportation 37

II. The Attorney General did not abuse his discretion in concluding that respondent did not in any event identify changed circumstances or new and material evidence warranting the extraordinary remedy of reopening 45

Conclusion 50

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Adams v. *Baker*, 909 F.2d 643 (1st Cir. 1990) 41
Alvarez-Flores v. *INS*, 909 F.2d 1 (1st Cir. 1990) 27
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 37
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 20
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 17
Brady v. *United States*, 397 U.S. 742 (1970) 12, 48
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 40
Cooter & Gell v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990) 38
Doherty v. *Meese*, 808 F.2d 938 (2d Cir. 1986) 3

Cases—Continued: Page

Eain v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981) 43
Fiallo v. *Bell*, 430 U.S. 787 (1977) 27
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 27
Galvan v. *Press*, 347 U.S. 522 (1954) 27
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 37
Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 27
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 27
INS v. *Abudu*, 485 U.S. 94 (1988) ..... *passim*
INS v. *Bagamasbad*, 429 U.S. 24 (1976) 36
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 13, 23, 24, 25, 26, 28, 29, 31, 40, 41
INS v. *Jong Ha Wang*, 450 U.S. 139 (1981) 16, 23
INS v. *Phinpathya*, 464 U.S. 183 (1984) 16
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 16, 17
INS v. *Stevic*, 467 U.S. 407 (1984) 13, 23, 24, 28, 30
Jay v. *Boyd*, 351 U.S. 345 (1956) 22
Jean v. *Nelson*, 472 U.S. 846 (1985) 29
Kashani v. *Nelson*, 793 F.2d 818 (7th Cir.), cert. denied, 479 U.S. 1006 (1986) 27
Lorillard v. *Pons*, 434 U.S. 575 (1978) 23
M.A. v. *INS*, 899 F.2d 304 (4th Cir. 1990) 27
Martin v. *OSHRC*, 111 S. Ct. 1171 (1991) 33
McClesky v. *Zant*, No. 89-7024 (Apr. 16, 1991) 45
McMullen, In re, Interim Dec. 2967 (BIA May 25, 1984) 42
McMullen v. *INS*, 788 F.2d 591 (9th Cir. 1986) 37, 41, 42, 43, 44, 45
Mobil Oil Exploration & Producing Southeast, Inc. v. *United Distribution Cos.*, 111 S. Ct. 615 (1991) 23
Ornelas v. *Ruiz*, 161 U.S. 502 (1896) 43
PBGC v. *LTV, Corp.*, 110 S. Ct. 2668 (1990) 32
Pierce v. *Underwood*, 487 U.S. 552 (1988) 38, 39, 40
Pinkerton v. *United States*, 328 U.S. 640 (1946) 42
Quinn v. *Robinson*, 783 F.2d 776 (9th Cir.) cert. denied, 479 U.S. 882 (1986) 43
Requested Extradition of Doherty, In re, 599 F. Supp. 270 (S.D.N.Y. 1984) 2
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953) 27

Cases—Continued: Page

Taylor v. *Illinois*, 484 U.S. 400 (1988) 49
United States v. *Broce*, 488 U.S. 563 (1989) 48
United States v. *Doherty*, 615 F. Supp. 755 (S.D. N.Y. 1985), aff'd, 786 F.2d 491 (2d Cir. 1986) .. 3
United States v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946) 17
Webster v. *Doe*, 486 U.S. 592 (1988) 40

Treaties, statutes, regulations and rule:

Anglo-Irish Agreement, Nov. 15, 1985, Ireland-United Kingdom, 24 I.L.M. 1597 (1985) 6
European Convention on the Suppression of Terrorism, Jan. 27, 1977, 15 I.L.M. 1272, 16 I.L.M. 233 6
Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom 3
Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, art. V(1)(c)(i), 28 U.S.T. 230, T.I.A.S. No. 8468 2
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (1954) 24
Art. 1(F), 19 U.S.T. 6263-6264 24
Art. 1(F)(b), 19 U.S.T. 6264 40
Art. 33, 19 U.S.T. 6276 24
Art. 33.1, 19 U.S.T. 6276 24
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 628 24
Universal Declaration of Human Rights, art. 14(1), U.N. Doc. A/811 (1948) 25
Equal Access to Justice Act, 28 U.S.C. 2412 (d)(1) 38
Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 901(b), 101 Stat. 1400 21
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:
§ 601(a), 104 Stat. 5069-5070 (§ 212(a)(3)(B)) 21
§ 602(a), 104 Stat. 5081 (§ 241(a)(4)(B)) .. 21

Statutes, regulations and rules—Continued: Page

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* 1
§ 101(a)(42), 8 U.S.C. 1101(a)(42) 7
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) .. 20
§ 103, 8 U.S.C. 1103 28
§ 203(a)(7)(A)(i), 8 U.S.C. 1153(a)(7)(A)(i) (1976) 30
§ 207, 8 U.S.C. 1157 ..... 13, 20, 30
§ 207(a)(2), 8 U.S.C. 1157(a)(2) 20
§ 207(c), 8 U.S.C. 1157(c) 20
§ 207(d), 8 U.S.C. 1157(d) 20
§ 207(e), 8 U.S.C. 1157(e) 20-21
§ 207(e)(6), 8 U.S.C. 1157(e)(6) 21, 31
§ 208, 8 U.S.C. 1158 ..... 2, 7, 10
§ 208(a), 8 U.S.C. 1158(a) ..... *passim*
§ 212(a)(20), 8 U.S.C. 1182(a)(20) 3
§ 212(d)(5), 8 U.S.C. 1182(d)(5) 14, 28, 29
§ 212(d)(5)(B), 8 U.S.C. 1182(d)(5)(B) 30
§ 241(a)(1), 8 U.S.C. 1251(a)(1) 3
§ 243(a), 8 U.S.C. 1253(a) 3, 4, 8, 12, 22
§ 243(h), 8 U.S.C. 1253(h) 3, 13, 23, 24, 36, 40
§ 243(h)(1), 8 U.S.C. 1253(h)(1) 7, 24, 34, 47
§ 243(h)(2), 8 U.S.C. 1253(h)(2) 34, 36
§ 243(h)(2)(A), 8 U.S.C. 1253(h)(2)(A) 8, 15, 35, 45
§ 243(h)(2)(C), 8 U.S.C. 1253(h)(2)(C) 8, 15, 35, 37, 39, 40, 41, 44, 45
§ 244, 8 U.S.C. 1254 23
§ 244(a), 8 U.S.C. 1254(a) 22
1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706 21
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ..... 10, 14, 28
18 U.S.C. 3184 2
8 C.F.R. (1987):
Section 3.2 ..... 16, 46
Section 103.5 16
Section 208.11 ..... 16, 17
Section 242.22 16

Regulations and rules—Continued: Page

Fed. R. Civ. P.:
Rule 11 38-39
Rule P. 56(e) 36

Miscellaneous:

Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981) 30
125 Cong. Rec. 23,238 (1979) 32
126 Cong. Rec. 4503 (1980) 31
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H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979) 28, 30, 31
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Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 31
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Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 31
S. Exec. Rep. No. 17, 99th Cong., 2d Sess. (1986) .. 3
S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 29, 30, 31
Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 Emory J. Int'l L. 43 (1990) 25

Miscellaneous—Continued: Page

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United States Dep't of State, *Patterns of Global Terrorism: 1988* (1989) 41

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 908 F.2d 1108. The opinions of the Attorney General (Pet. App. 46a-91a, 116a-130a), the Board of Immigration Appeals (Pet. App. 92a-115a, 131a-133a, 134a-147a, 148a-155a), and the immigration judge (Pet. App. 156a-159a) are unreported.

JURISDICTION

The judgment of court of appeals was entered on June 29, 1990. Pet. App. 160a. A timely petition for rehearing was denied on September 13, 1990. Pet. App. 161a. The petition for a writ of certiorari was filed on December 11, 1990, and was granted on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, and implementing regulations are set forth at App., *infra*, 1a-8a.

STATEMENT

A. Respondent is a native of Northern Ireland, a citizen of the United Kingdom, and a member of the terrorist organization known as the Provisional Irish Republican Army (PIRA). Before illegally entering the United States in 1982, respondent had an extensive criminal record in Northern Ireland. In 1973, he was convicted of possessing a firearm, and in 1974 he was convicted of possessing 80 pounds of explosives. On May 2, 1980, five months after his release from prison, respondent and three other PIRA members drove in a highjacked van to a private house in North Belfast, while the driver was held captive. They seized the house, holding the family captive, and attacked a car full of British soldiers, killing one. Respondent was arrested and tried in Belfast. After the close of evidence but prior to verdict, respondent and seven others escaped from a maximum security prison armed with weapons smuggled into the prison. On June 12, 1981, respondent was convicted *in absentia* of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization. He was sentenced to life imprisonment. Pet. App. 2a, 46a-47a, 43a-44a, 84a-88a; J.A. 161-188.

B. After fleeing to the Republic of Ireland, respondent entered the United States under an alias in 1982 and was arrested in 1983. The INS immediately instituted deportation proceedings, and respondent applied for asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158. Pet. App. 3a; J.A. 5-18.[1]

[1] In August 1983, at the request of the United Kingdom, the United States sought a warrant under 18 U.S.C. 3184 authorizing extradition of respondent. On December 12, 1984, Judge Sprizzo of the Southern District of New York denied the application, holding that respondent's crimes of May 2, 1980, fell within the exception in the extradition treaty for offenses of a "political character." *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D. N.Y. 1984); see Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, art. V(1)(c)(i), 28 U.S.T. 230, T.I.A.S. No. 8468. An order denying extradition is not appealable, and the government's attempt to obtain collateral review of the order in a declaratory judgment action was unsuccessful. *United States* v. *Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), aff'd, 786 F.2d 491 (2d Cir. 1986). The deportation proceedings were stayed pending completion of the extradition and related proceedings.

At his deportation hearing in September 1986, respondent withdrew his application for asylum, waived his right to seek that relief, disavowed any intention to apply for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), and admitted that he was deportable on the ground that he had entered the United States without valid immigration documents, in violation of 8 U.S.C. 1251(a)(1) and 1182(a)(20). Pet. App. 49a-50a. Section 243(a) provides that an alien shall be deported to a country he designates, "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." 8 U.S.C. 1253(a). Respondent designated Ireland, but the INS objected on the ground that he might avoid punishment there, which would be "prejudicial to the interests of the United States" in combatting terrorism. The immigration judge nevertheless ordered respondent deported to Ireland, Pet. App. 156a-159a, and the Board of Immigration Appeals (BIA) affirmed. *Id.* at 148a-155a.[2]

[2] Four days after the immigration judge's decision, respondent filed a habeas corpus petition seeking immediate deportation to Ireland. The district court and court of appeals denied relief. *Doherty* v. *Meese*, 808 F.2d 938 (2d Cir. 1986). The court of appeals noted that respondent sought this relief because of a then-pending supplementary extradition treaty between the United States and the United Kingdom, which had been ratified by the Senate and was then pending before the British House of Commons. That treaty, which subsequently entered into effect on December 23, 1986, excluded such crimes as murder, serious unlawful detention, hostage taking, and firearms offenses from the "political offense" exception on which Judge Sprizzo had relied in declining to authorize extradition of respondent. 808 F.2d at 940; Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, as amended. See S. Exec. Rep. No. 17, 99th Cong., 2d Sess. (1986); see note 1, *supra*.

On June 9, 1988, Attorney General Meese reversed the BIA's decision and ordered respondent deported to the United Kingdom. Pet. App. 116a-130a. He concluded that deporting respondent to Ireland would be "prejudicial to the interests of the United States" within the meaning of Section 243(a) because it would conflict with the policy of the United States to ensure that individuals who commit acts of violence against democratic states are punished quickly and lawfully, would undermine the United Kingdom's "confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern," and "might well prejudice broader aspects of our bilateral relationship." Pet. App. 125a-127a

C. While the matter was pending before Attorney General Meese, respondent moved to designate a country other than Ireland and to reopen the proceedings so that he could apply for asylum and withholding of deportation. J.A. 55-66. As grounds for this motion, respondent relied solely on an Extradition Act that was adopted in Ireland in January 1987 (and became effective on December 1, 1987), J.A. 94-108, which he contended would result in his extradition to the United Kingdom were he deported to Ireland. C.A. App. 354-373.

The BIA refused to allow respondent to withdraw his designation of Ireland. But by a 3-2 vote, the BIA granted his motion to reopen, albeit on a different ground: although the INS had taken the position from the outset that respondent should be deported to the United Kingdom rather than Ireland, the majority believed that respondent "could not have been expected to anticipate that he would not be deported to his country of choice" and that his failure to file for asylum at an earlier date was "excusable" for this reason. Pet. App. 99a; see *id.* at 92a-100a. The dissenting BIA members would have denied reopening as a matter of discretion in light of the "extremely serious nature of the crimes which [respondent] has admitted committing and for which he has been convicted" in Northern Ireland, respondent's status as a "terrorist and a member of a terrorist organization" that "has used explosives on a number of occasions in

which innocent civilians were killed or injured," respondent's conviction for transporting such explosives for the PIRA, and the actions of respondent and his accomplices in taking civilians hostage and exposing them to a gun battle. *Id.* at 105a-106a.

D. On June 30, 1989, Attorney General Thornburgh disapproved the BIA's order and denied respondent's motion to reopen his deportation proceedings. Pet. App. 46a-91a.

1. The Attorney General first concluded that respondent had not identified changed circumstances that warranted reopening, thereby rejecting the BIA's notion that Attorney General Meese's denial of respondent's request to be deported to Ireland satisfied that requirement. Pet. App. 58a-59a, 65a-67a.[3] He reasoned that the Attorney General's invocation of his express statutory authority to reject a deportee's designation "certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interests should prevail." *Id.* at 58a-59a; see also *id.* at 66a-67a. Moreover, in his view, "[t]he ultimate decision in an administrative process cannot itself constitute 'new' evidence to justify reopening"; otherwise, "there could never be finality in the process." *Id.* at 67a.

The Attorney General also rejected respondent's contention (which the BIA had not addressed) that the 1987 Irish Extradition Act warranted reopening. Pet. App. 59a, 67a-74a. He found that event "neither sudden nor

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[3] The Attorney General found it unnecessary to decide whether respondent had established a prima facie case of eligibility for asylum or withholding of deportation, noting that he had discretion to deny reopening even had respondent done so. Pet. App. 64a-65a n.21 (citing *INS* v. *Abudu*, 485 U.S. 94 (1988)).

unforeseeable," since the Act gave effect to the European Convention on the Suppression of Terrorism (Jan. 27, 1977), 15 I.L.M. 1272, 16 I.L.M. 233, and Ireland had formally committed itself to that Convention in November 1985[4] and signed it in February 1986, "more than six months *before* respondent withdrew his applications for asylum and for withholding of deportation." Pet. App. 67a-68a. Those events were widely publicized, and the Attorney General concluded that "[r]espondent, having expressly based his designation on a counseled understanding of Irish extradition laws, is properly chargeable with knowledge of Ireland's signing of the European Convention." *Id.* at 68a. The Attorney General further ruled that the Extradition Act did not warrant reopening because (i) it did not alter the provisions of United States immigration law that govern respondent's deportation and application for asylum and withholding of deportation (*id.* at 69a-70a); (ii) the Act did not work a substantial change in Irish law, since respondent was subject to extradition from Ireland to the United Kingdom even prior to the new Extradition Act (a point respondent repeatedly made when he sought to be deported to Ireland), and since the new Act bars extradition if sought for purposes of persecution (*id.* at 70a-72a); and (iii) any change in Irish law was irrelevant because respondent was to be deported to the United Kingdom, not Ireland (*id.* at 74a).

Finally, the Attorney General found that the evidence of conditions in Northern Ireland that respondent submitted with his motion to reopen did not satisfy the newly-discovered-evidence standard for reopening, because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence that was presented." Pet. App. 75a; see *id.* at 74a-78a.[5]

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[4] See Anglo-Irish Agreement, Nov. 15, 1985, Ireland-United Kingdom, 24 I.L.M. 1579, 1581 (1985).

[5] Respondent had submitted a report by Amnesty International (C.A. App. 452-455, 511-558), a book on which that report drew (*id.* at 559-709), and an affidavit of his mother, accompanied by newspaper articles (*id.* at 407-450; see J.A. 78-89.). The BIA, over two dissents (see Pet. App. 101a-102a), found this evidence material and sufficient (if unrebutted) to make out a "prima facie claim of a well-founded fear of persecution." *Id.* at 99a. That is the standard for establishing the status of a "refugee" under Section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), which in turn is necessary for an alien to be eligible for the discretionary relief of asylum under Section 208 of the Act. Contrary to the apparent view of the court of appeals (Pet. App. 12a), however, the BIA did not make any finding as to whether that evidence established a prima facie case of eligibility under the higher standard for mandatory withholding deportation under Section 243(h)(1)—namely, that the alien's life or freedom "would be threatened" in the foreign country.

2. Next, the Attorney General found that respondent's waiver of asylum and withholding of deportation in September 1986 was "part of a calculated plan to [try to] ensure immediate deportation to Ireland before the United Kingdom ratified its [supplementary extradition] treaty with the United States, which would have allowed [respondent] to be extradited directly to the United Kingdom." Pet. App. 60a; see note 2, *supra*. In the Attorney General's judgment, respondent had assumed the risk that his tactical choice might not succeed, and "the interests in the integrity of the administrative process and finality of decision" required that his waiver be given effect. *Id.* at 79a, 81a.

3. The Attorney General also denied reopening on the independent ground that respondent would not be granted asylum or withholding of deportation in any event. Pet. App. 60a-61a, 81a-91a. The Attorney General decided, in his discretion, that he would not grant respondent asylum because: (i) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment"; (ii) "it is in the foreign policy interests of this country that respondent be deported to the United Kingdom"; (iii) "respondent knowingly and intentionally waived his claim to asylum"; and (iv) respondent's past actions "suggest that he is not deserving of equitable relief." *Id.* at 82a.

The Attorney General found respondent ineligible for withholding of deportation under two statutory exclusions. First, he determined that there are "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside of the United States." 8 U.S.C. 1253(h)(2)(C). That determination was based both on the crimes respondent indisputably committed and on probable cause to believe that he committed other violent crimes against innocent civilians as an active member of the PIRA, which the United States officially regards as a terrorist organization and has been found to have killed or attempted to kill those who politically oppose its activities. Pet. App. 83a-88a & n.50, 89a. The Attorney General also found respondent ineligible because, through his active role in the PIRA—serving as an officer, gathering ammunition, distributing arms, and training PIRA members—he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion," 8 U.S.C. 1253(h)(2)(A). Pet App. 89a-91a.

E. The court of appeals sustained Attorney General Meese's order directing respondent's deportation to the United Kingdom, but it set aside Attorney General Thornburgh's order denying respondent's motion to reopen the proceedings. Pet. App. 1a-45a.

1. In sustaining Attorney General Meese's order, Pet. App. 7a-9a, the court held that Section 243(a) confers "broad discretion" to decide what is prejudicial to national interests, which "requires an essentially political determination" that is "essentially unreviewable" by a court. Pet. App. 8a. The court accepted Attorney General Meese's explanation that "deporting [respondent] to the Republic of Ireland, indeed anywhere but the United Kingdom, would harm our relationship with the United Kingdom and would contradict our policy of punishing violence against democratic nations." *Id.* at 9a. In the court's view, "[j]udgments of this nature are surely within the scope of the attorney general's discretion under § 243(a)," and it was "not permitted to second-guess them." *Ibid.*

2. By contrast, the court, over Judge Lumbard's dissent, set aside Attorney General Thornburgh's order denying respondent's motion to reopen, holding, *inter alia*, that the Attorney General could not consider these same anti-terrorism and foreign policy factors when passing on respondent's asylum request. Pet. App. 9a-29a. Although the Court stated in *INS* v. *Abudu*, 485 U.S. 94 (1988), that reopening may be denied on "at least" three grounds, thereby leaving open others as well, the court of appeals treated the grounds identified in *Abudu* as exclusive and found that they were not present here. Pet. App. 11a-12a, 16a.

a. The court first noted that Attorney General Thornburgh did not base his decision on a finding that respondent failed to establish a prima facie case of eligibility for substantive relief. See note 3, *supra*. It therefore assumed for purposes of the appeal that respondent had satisfied that burden. Pet. App. 12a.

b. The court next held that the Irish Extradition Act and Attorney General Meese's decision ordering respondent deported to the United Kingdom rather than Ireland satisfied respondent's burden of producing "previously unavailable, material evidence" or a "reasonable explanation" for why he had not theretofore requested asylum or withholding of deportation. Pet. App. 12a-15a. The court ruled that Attorney General Thornburgh should not have looked to whether those events were foreseeable when respondent waived his right to seek asylum or withholding of deportation, because, in its view, an alien should not have to consider anything beyond the facts and law in existence at the time he makes such a tactical decision. *Id.* at 13a.[6] In addition, the court faulted the

[6] The court rejected the Attorney General's conclusion that respondent assumed the risk that his designation of Ireland might be disapproved or that Ireland might amend its extradition laws, and that respondent therefore should be held to his prior waiver of his right to apply for asylum and withholding of deportation. Pet. App. 27a-28a. The court did not dispute the Attorney General's finding that these were "deliberate tactical decisions" by respondent. *Id.* at 27a. But it found his concern for the "integrity of the

Attorney General for taking a different view of the facts than the BIA, and it deferred to the BIA's judgment, rather than that of the Attorney General, as to when reopening is warranted, on the theory that the BIA "repeatedly deals with motions to reopen, and has, no doubt, developed a body of informed experience that helps it distinguish meritorious motions from those lacking in merit." *Id.* at 14a.

c. The court of appeals further found that Attorney General Thornburgh erred in deciding that respondent would not ultimately obtain asylum or withholding of deportation. Pet. App. 15a-27a. It held that the Attorney General could not base his denial of asylum on the United States' policy that those who commit acts of violence against a democratic state should receive prompt and lawful punishment, or on other foreign policy interests. *Id.* at 17a-27a. The court acknowledged that these same factors were "clearly relevant" to Attorney General Meese's denial of respondent's request to be deported to Ireland, *id.* at 26a-27a, and that the Attorney General has "broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests." *Id.* at 18a. But it found these to be "improper factors" in the asylum context. *Ibid.* The court pointed to no preclusion of such factors in the text of Section 208, which, it recognized, Pet. App. 17a-18a, broadly provides that an alien who satisfies the threshold requirement of being a refugee "may" be granted asylum "in the discretion of the Attorney General." Instead, in holding that the Attorney General has a "more limited role" and only "limited discretion" in asylum cases, the court relied on what it regarded as the "spirit" of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102), drawn from its legislative history, Pet. App. 19a-25a, and it deferred once again to the BIA's past practice in asylum cases, rather than the Attorney General's considered judgment. *Id.* at 24a-25a.

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administrative process" to be "unconvincing" and insufficient to justify denial of reopening. *Id.* at 28a.

The court similarly held that the Attorney General could not deny reopening based on the two statutory exclusions from eligibility for withholding of deportation. Pet. App. 15a-17a. It believed that the Attorney General's power to deny reopening for reasons other than a lack of new evidence or the alien's failure to establish a prima facie case of eligibility for the underlying relief is limited to cases in which the ultimate grant of relief is discretionary, and that he therefore "simply has no discretion" to deny reopening based on a finding of ineligibility for mandatory withholding of deportation. *Id.* at 16a.

3. Judge Lumbard dissented from the reversal of Attorney General Thornburgh's decision. Pet. App. 29a-45a. He stressed that reopening is "committed to the discretion of the Attorney General" and "'disfavored in deportation proceedings,'" *id.* at 31a-33a (quoting *Abudu*, 485 U.S. at 107), and that "[w]hen the Attorney General decides, after a careful review of the voluminous record, that a drawn-out case such as this one no longer merits attention, we are in no position to contradict that judgment." Pet. App. 33a. Judge Lumbard also criticized the majority for according more deference to the BIA than to the Attorney General, because "[m]atters which concern asylum and deportation are primarily matters of foreign policy and political judgment," and "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a. And Judge Lumbard found the majority too rigid in applying *Abudu*, because the reasons identified in *Abudu* for denying reopening were "clearly not meant to be exhaustive." *Id.* at 34a-35a.

Judge Lumbard also disagreed with the majority's specific rulings. First, he disputed its holdings that the Attorney General may not take anti-terrorism or foreign policy concerns into account in exercising his discretion on asylum requests, and that his authority to deny asylum to eligible aliens "is limited to a narrow class of cases." Pet. App. 37a; see *id.* at 35a-38a. He noted that "[w]hile Congress has established rules for determining who is

eligible for asylum, it has created no rules for determining who among those eligible for asylum should receive that relief," instead committing that determination to "the discretion of the Attorney General." *Ibid.* (quoting 8 U.S.C. 1158(a)). In Judge Lumbard's view, this is "the broadest language possible," and, if anything, it affords the Attorney General wider latitude than he has to reject an alien's designation of the country of deportation under Section 243(a), under which the majority allowed consideration of anti-terrorism and foreign policy concerns. Pet. App. 36a-37a. Judge Lumbard also found it significant that "Congress specifically rejected making asylum mandatory upon the appropriate showing," which demonstrates that "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." *Id.* at 36a.

Second, Judge Lumbard rejected the notion that either Attorney General Meese's decision or the Irish Extradition Act warranted reopening, Pet. App. 38a-41a, finding respondent's position analogous to that of a criminal defendant who cannot withdraw a guilty plea "merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* at 40a (quoting *Brady* v. *United States*, 397 U.S. 742, 757 (1970)). He also believed that the Extradition Act was not a "new" development warranting reopening, in light of the Attorney General's conclusion that respondent "was extraditable from the Republic of Ireland to the United Kingdom even prior to December 1, 1987 on the basis of long-standing provisions of Irish law." *Id.* at 40a-41a.

Finally, Judge Lumbard would have sustained the Attorney General's determination that respondent is excluded from eligibility for withholding of deportation. Pet. App. 42a-45a. In particular, Judge Lumbard reasoned that "[s]ince the record is replete with [respondent's] admissions of actions constituting violations of § 243(h)(2), and since the Attorney General's determination that [respondent] failed the test in subsection (C)

is a model of a reasoned decision based on the record, * * * he properly denied the motion to reopen to the extent it was for the purpose of applying for withholding." *Id.* at 42a-43a.

SUMMARY OF ARGUMENT

The decision whether to reopen deportation proceedings to allow an alien to apply for asylum or withholding of deportation is committed to the Attorney General's discretion. *INS* v. *Abudu*, 485 U.S. 94 (1988). He did not abuse that discretion here.

I. A. The court of appeals erred in holding that the Attorney General has only limited discretion—and may not consider the Nation's opposition to terrorism and foreign policy concerns—when deciding whether to grant asylum. Section 208(a) of the Immigration and Nationality Act provides that an alien "may be granted asylum in the discretion of the Attorney General" if the Attorney General determines that he is a "refugee." Although "refugee" status establishes *eligibility* for asylum, nothing in Section 208(a) precludes consideration of foreign policy concerns or otherwise limits the Attorney General's discretion to decide who among eligible aliens will be granted that relief. This conclusion is reinforced by Section 207 of the Act, which confers unqualified discretion on the Attorney General to admit refugees from outside the United States and expressly allows consideration of "foreign policy interests." It also is reinforced by other provisions of the Act that confer comparably unfettered discretion and that the court of appeals acknowledged allow consideration of foreign policy concerns.

The limitations the court below placed on the Attorney General's discretion cannot be reconciled with *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Stevic*, 467 U.S. 407 (1984), where the Court stressed that no alien has a right to asylum and contrasted Section 208(a) to Section 243(h), which mandates withholding of deportation to a country where the alien would be threatened with persecution. The Court explained that Section 243(h) implements the *nonrefoulement* require-

ment of the Convention Relating to the Status of Refugees, whereas Section 208(a) corresponds to a wholly "precatory" provision of the Convention concerning admission of refugees. The court of appeals' notion that foreign policy concerns are "improper" in asylum cases also conflicts with *Abudu*, which sustained a denial of reopening to seek asylum and accorded special deference to the INS because it "must exercise especially sensitive political functions that implicate questions of foreign relations." 485 U.S. at 110.

The legislative history of the Refugee Act of 1980 strongly supports the Attorney General's decision, because it contains numerous statements confirming the close nexus between asylum and foreign policy, and contains no suggestion of an intent to limit the unfettered discretion the Attorney General previously exercised in deciding whether to grant asylum pursuant to his parole power under Section 212(d)(5) of the Act. The court of appeals found it significant that Congress prescribed eligibility for asylum through a "politically neutral" definition of the term "refugee," and thereby broadened the category of aliens eligible for entry from outside the United States. That revision, however, had no effect on the Attorney General's unqualified discretion to decide who among eligible aliens would be granted asylum or admission, and indeed Congress specifically rejected a proposal to make the granting of asylum mandatory.

Finally, the court of appeals should have deferred to the Attorney General's formal interpretation of Section 208(a), not inferences drawn from the Board of Immigration Appeals' practice. If limitations are to be placed on the United States' sovereign power to deny asylum, they should be the product of diplomacy and reciprocity among Nations, not judicially fashioned standards.

B. The court of appeals erred in holding that the Attorney General had no discretion to deny reopening based on a finding that respondent is excluded from eligibility for withholding of deportation. The existing record incorporated respondent's testimony at his extradition hearing, in which he admitted the conduct on which the Attorney General based his decision. No further hearing was necessary. The Attorney General's denial of reopening in these circumstances is subject to judicial review under an abuse-of-discretion standard.

The Attorney General properly found respondent ineligible for withholding of deportation under Section 243(h)(2)(C), based on his determination that there are "serious reasons for considering" that respondent committed a "serious nonpolitical crime" in Northern Ireland. That ruling is entitled to special deference, because the text and background of the Act establish that the determination is for the Attorney General to make and that his *characterization* of the crime is critical. Here, the Attorney General's determination rested both on the May 2, 1980, incident in Belfast and respondent's active participation in the Provisional Irish Republican Army, which is officially regarded by the United States as a terrorist organization and was found to have killed or attempted to kill its political opponents and caused violence against innocent civilians. Any "political" element of those offenses was overcome by their atrocious nature and lack of proportion and close causal nexus to their alleged political objective. For similar reasons, the Attorney General properly found respondent ineligible under Section 243(h)(2)(A) because he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion."

II. The Attorney General did not abuse his discretion in deciding that respondent had in any event failed to identify new evidence or changed circumstances that warranted reopening so that he could file a belated application for asylum or withholding of deportation. Respondent relied solely on an Extradition Act adopted in Ireland in 1987, which, he contended, would result in his extradition to the United Kingdom if he was deported to Ireland. But any change in *Irish* law was irrelevant to his claims for asylum and withholding of deportation to the *United Kingdom*. Moreover, the Attorney General found that the 1987 Act did not work a material change in Irish law, and that Ireland had publicly committed itself to the revi-

sion well before respondent waived his right to apply for asylum and withholding of deportation in 1986.

ARGUMENT

THE ATTORNEY GENERAL PROPERLY DENIED RESPONDENT'S MOTION TO REOPEN HIS DEPORTATION PROCEEDINGS

At his deportation hearing in September 1986, respondent withdrew his asylum application and waived his right to seek asylum or withholding of deportation, hoping to bring about his immediate deportation to Ireland before a new extradition treaty between the United States and the United Kingdom came into force. See page 7 and note 2, *supra*. After failing in that attempt to avoid punishment for the murder and related crimes he committed in the United Kingdom, respondent repudiated his tactical choice and sought to reopen the proceedings to seek the special relief (asylum and withholding of deportation) that he previously had disavowed. The Attorney General properly refused to countenance such manipulation of the administrative process.

This Court has repeatedly held that the decision whether to reopen deportation proceedings under applicable regulations is committed to the discretion of the Attorney General. *INS* v. *Abudu*, 485 U.S. 94, 105-106 (1988); *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981).[7]

[7] 8 C.F.R. 3.2 provides that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing," and that no motion to reopen to seek discretionary relief shall be granted "unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing." See also 8 C.F.R. 103.5, 242.22. Because Section 3.2 is "framed negatively" and "does not affirmatively require the Board to reopen the proceedings under any particular condition," it confers discretion on the BIA to deny a motion to reopen even where the conditions it specifies are satisfied. *Abudu*, 485 U.S. at 105-106 (quoting *Jong Ha Wang*, 450 U.S. at 144 n.5). Similarly, 8 C.F.R. 208.11 provides that a motion to reopen

Courts may not order reopening of any administrative proceeding except "in the most extraordinary circumstances," *Abudu*, 485 U.S. at 107 n.11 (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974)), upon "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). And "the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context," because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations." *Abudu*, 485 U.S. at 110. The court of appeals failed to respect these settled principles when it ordered the Attorney General to reopen respondent's deportation proceedings, since his denial of reopening plainly was not an "unreasoned or arbitrary exercise of discretion." *Rios-Pineda*, 471 U.S. at 451.

Indeed, the Attorney General's decision not to reopen the proceedings was fully justified on several independent grounds. First, where the underlying substantive relief the alien seeks in his motion to reopen is itself discretionary, the Attorney General may decide that even if all other requirements for reopening might be satisfied, relief should be denied as a discretionary matter. *Abudu*, 485 U.S. at 105. Accordingly, as we explain in Point I(A), *infra*, insofar as respondent sought to apply for asylum, the Attorney General properly denied his motion to reopen on the ground that foreign policy concerns (including the Nation's opposition to terrorism) and re-

to request asylum "must reasonably explain the failure to request asylum" at an earlier date and that if the alien fails to do so, the claim shall be considered frivolous, absent evidence to the contrary. The regulation does not state that reopening must be granted if the movant does furnish a reasonable explanation. Thus, 8 C.F.R. 208.11 (which the Court in *Abudu* construed to apply to requests for withholding of deportation as well as asylum) likewise confers discretion to deny a motion to reopen even where the conditions it specifies are satisfied. 485 U.S. at 99 n.3, 104-105, 106-107 & n.10.

spondent's criminal background would not warrant an exercise of discretion in his favor. In a related vein, as we explain in Point I(B), *infra*, the Attorney General properly denied the motion to reopen insofar as respondent sought to apply for withholding of deportation, because although that relief is not discretionary, the Attorney General reasonably determined, based on respondent's own admissions in the record, that he would be ineligible under either of two separate statutory exclusions.

Second, as we explain in Point II, *infra*, the Attorney General properly denied respondent's motion to reopen for an independently sufficient reason identified in *Abudu*, 485 U.S. at 105: even if (contrary to our submission in Point I) respondent had made the sort of showing that would have warranted the discretionary granting of asylum or mandatory withholding of deportation if he had sought such relief in a timely manner, the Attorney General did not abuse his discretion in finding that respondent had failed to identify any new evidence or changed circumstances that justified respondent's *belated* attempt to raise those issues in a motion to reopen.

I. THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETION IN DENYING RESPONDENT'S MOTION TO REOPEN ON THE GROUND THAT RESPONDENT WOULD NOT IN ANY EVENT BE GRANTED ASYLUM OR WITHHOLDING OF DEPORTATION

A. The Attorney General Properly Considered The Nation's Opposition To Terrorism And Other Foreign Policy Concerns In Deciding That Respondent Is Not Deserving Of The Special Humanitarian Relief Of Asylum

The Attorney General denied respondent's motion to reopen insofar as he sought to apply for asylum on the ground, *inter alia*, that he would not, in the end, grant that discretionary relief to respondent. The Attorney General cited a number of reasons: (i) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment"; (ii) "the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom"; (iii) "respondent knowingly and intentionally waived his claim to asylum"; and (iv) respondent's "membership in and assistance of the PIRA in its acts of presecution, and the nature and number of his criminal acts in general, * * * suggest that he is not deserving of equitable relief." Pet. App. 82a. The mere recitation of these reasons is sufficient to demonstrate that the Attorney General acted properly—and manifestly did not abuse his discretion—in deciding that respondent should not be granted the special humanitarian relief of asylum.

The court of appeals nonetheless overturned the Attorney General's determination. It held that in deciding whether to grant asylum to an alien, the Attorney General has only a "limited role" and "limited discretion," Pet. App. 25a, and cannot consider "factors such as the government's geopolitical and foreign policy interests"—including "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Id.* at 21a, 26a. It instead held that the Attorney General's discretion may only be exercised to promote "administrative fairness and efficiency" and prevent procedural "abuses" in the asylum system. *Id.* at 24a-25a. The court clearly erred in imposing these unprecedented limitations on the Attorney General's discretion. The support of democratic governments and the rule of law are central to this Nation's history. It is inconceivable that Congress intended to require the Attorney General to ignore these principles when deciding whether to grant an alien "so great a privilege as asylum in the United States." *Id.* at 38a n.3 (Lumbard, J., dissenting).

1. *The Text Of Section 208(a) And Related Provisions Of The Act Does Not Support The Limitations The Court Of Appeals Placed On The Attorney General's Discretion*

a. Nothing in the text of Section 208(a) of the Act, 8 U.S.C. 1158(a), supports the limitations the court of appeals imposed. Section 208(a) provides that an alien "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." Although "refugee" status is clearly a necessary condition for an alien to be granted asylum, the text makes equally clear that such status does not entitle the alien to relief; that is a separate matter, expressly committed to "the discretion of the Attorney General." Put another way, although Section 208(a) incorporates standards to guide the Attorney General's determination of whether an alien is a "refugee" for these purposes (see 8 U.S.C. 1101(a)(42)(A)), and thereby limits his discretion to *grant* asylum, it does not limit the Attorney General's discretion to *deny* asylum. Compare *Bowen* v. *Yuckert*, 482 U.S. 137, 148 (1987). In particular, there is no suggestion that the Attorney General may not consider the Nation's foreign policy concerns when passing on an asylum application.

b. The closely related provisions of Section 207 of the Act, 8 U.S.C. 1157, confirm that the Attorney General has broad discretion in this area and is not prohibited from taking foreign policy considerations into account. That Section establishes procedures for the admission of refugees from outside the United States. Section 207(a)(2) provides that, for years after 1982, the number of refugees admitted "shall be * * * such * * * as the President determines * * * is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. 1157(a)(2). Section 207(c) then provides that subject to these numerical limitations, "the Attorney General may, in the Attorney General's discretion * * *, admit any refugee who is not firmly resettled in any foreign country," if he "is determined to be of special humanitarian concern to the United States." 8 U.S.C. 1157(c). These standards plainly are broad enough to encompass consideration of foreign policy concerns, both in general and in individual cases. But if there could be any doubt on this score, it is dispelled by the provisions for consultation regarding the number of refugees to be admitted annually. See § 207(d) and (e), 8 U.S.C. 1157(d) and (e). In order to facilitate that consultation, the President must furnish Congress specified information, including "[a]n analysis of the impact of the participation of the United States in the resettlement of such refugees on the *foreign policy interests* of the United States." § 207(e)(6), 8 U.S.C. 1157(e)(6) (emphasis added).

These provisions establish that if respondent were applying for relief as a refugee *outside* the United States, the Attorney General would not abuse his discretion if he denied that relief because—in light of respondent's membership in a terrorist organization, his criminal conduct in Northern Ireland, and the United Kingdom's strong interest in his prompt return to serve his sentence—respondent is not an alien "of special humanitarian concern to the United States" and his admission would not further the "national interest" and would have an adverse impact on the "foreign policy interests of the United States." There is no basis in the text of Section 208(a) for concluding that the Attorney General is prohibited from taking these same considerations into account when deciding whether to grant the parallel (and equally discretionary) relief of asylum to an alien who has managed to enter the United States illegally.[8]

c. The court of appeals' narrow view of the Attorney General's authority in asylum matters likewise cannot be

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[8] Cf. Sections 212(a)(3)(B) and 241(a)(4)(B) of the Act (as added by the Immigration Act of 1990, Pub. L. No. 101-649, §§ 601(a) and 602(a), 104 Stat. 5069-5070, 5081) (providing for exclusion and deportation of aliens who have "engaged in terrorist activity"); Pub. L. No. 100-204, § 901(b), 101 Stat. 1400 (same); 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706.

squared with still other provisions of the Immigration and Nationality Act. Even the court of appeals acknowledged that those other provisions permit the Attorney General to consider foreign policy concerns, yet it offered no persuasive basis for distinguishing Section 208(a) from this established statutory pattern.

First, the court of appeals' holding that Attorney General Thornburgh's discretionary denial of asylum rested on improper factors is especially anomalous in light of its ruling that Attorney General Meese properly relied on the same anti-terrorism and foreign policy concerns in rejecting respondent's designation of Ireland as the country of deportation under Section 243(a). Pet. App. 7a-9a. As Judge Lumbard explained, *id.* at 36a-37a, a comparison of Sections 208(a) and 243(a) does not suggest such dramatically different outcomes, because both commit the ultimate decision to the "discretion" of the Attorney General if a specified condition is satisfied.

Second, the court erred in believing that Section 208(a) stands in "significant contrast" to Section 244(a) of the Act, 8 U.S.C. 1254(a), which provides that the Attorney General "may, in his discretion," suspend the deportation of an alien who satisfies certain eligibility requirements. Pet. App. 21a-22a. In *Jay* v. *Boyd*, 351 U.S. 345 (1956), the Court described the Attorney General's discretion under Section 244 as "unfettered," explaining (351 U.S. at 353-354):

> Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute * * * does not restrict the considerations which may be relied upon * * *. [A grant of relief] is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace.

This description applies equally here, because Section 208(a) directly parallels Section 244(a): it prescribes standards of eligibility (by incorporating the definition of "refugee"), but does not provide standards for determining who among qualified applicants should receive the ultimate relief or restrict the considerations that may be relied upon by the Attorney General. Because Congress drafted Section 208(a) in this parallel manner, it presumably intended the Attorney General's discretion to be comparably unfettered. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 624 (1991). Indeed, that was this Court's understanding in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). There, the Court described the discretion conferred by Section 208(a) as "typical" under the Act, and as a comparable example, it cited *INS* v. *Jong Ha Wang*, *supra*, which involved suspension of deportation under Section 244.

2. *This Court's Decisions In* Cardoza-Fonseca, Stevic, *And* Abudu *Refute The Court Of Appeals' Construction Of Section 208(a)*

Not only do the limitations imposed by the court of appeals find no basis in the text of Section 208(a); they also cannot be reconciled with this Court's decisions discussing the text and purposes of Section 208(a).

a. The Court stressed in *Cardoza-Fonseca*, 480 U.S. at 428 n.5, that "[t]he Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee," and that "a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General*.'" The Court similarly stressed in *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984), that "[m]eeting the definition of 'refugee' * * * does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a)." As the emphasis supplied by the Court in both cases suggests, these statements were integral to the Court's explanation of the place of Section 208(a) in the statutory scheme.

Specifically, in *Cardoza-Fonseca*, the Court contrasted Section 208(a) to Section 243(h) of the Act, which

provides for withholding of deportation of a refugee to a particular country where his "life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1253(h)(1). Section 243(h) implements the *nonrefoulement* requirements in Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150,[9] to which the United States is bound as a result of its accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268. Withholding of deportation is mandatory, but it is "country specific" and does not bar deportation to a third country. *Cardoza-Fonseca*, 480 U.S. at 428 n.6, 429 & n.7, 440-441; *Stevic*, 467 U.S. at 416.

Asylum, the Court observed in *Cardoza-Fonseca*, "is a greater form of relief" than withholding of deportation, because "the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to numerical limitations and the applicable regulations." 480 U.S. at 428-429 n.6. But in contrast to Section 243(h), Section 208(a) establishes a "discretionary mechanism" that merely "gives the Attorney General the *authority* to grant the broader relief of asylum to refugees." 480 U.S. at 441. This follows, the Court explained, from the fact that Section 208(a) does not implement the mandatory *nonrefoulement* provisions of Article 33 of the Convention, but "instead corresponds to Article 34"; although the latter Article does

[9] Article 33.1 provides: "No contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Certain aliens are ineligible for this protection by virtue of exclusions from the definition of "refugee" in Article 1(F), 19 U.S.T. 6263-6264. See page 40, *infra*.

not actually address asylum as such,[10] it urges the contracting States to "facilitate the assimilation and naturalization of refugees" and, "[l]ike § 208(a)," only provides for a precatory, or discretionary * * * benefit" for persons found to be refugees. 480 U.S. at 441.[11] Because this Court has already construed Section 208(a) to do no more than establish a "discretionary mechanism" by which the Executive Branch may take measures that correspond to a provision of the Convention that is itself only "precatory" and "discretionary," it should not be construed to impose substantive, judicially enforceable limitations on the Attorney General's discretion to deny asylum to a particular alien.

b. This conclusion is reinforced by the Court's rejection of the government's argument in *Cardoza-Fonseca* that "it is anomalous for § 208(a), which affords greater benefits than § 243(h), * * * to have a less stringent standard of eligibility" ("well-founded fear," rather than "would be threatened"). This argument, the Court explained, failed to take account of the fact that an alien who satisfies the lesser standard "does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion,

[10] See Office of the U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 7 para. 25 (1988) ("the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol") [hereinafter *U.N. High Commissioner's Handbook*].

[11] There is no right to asylum under international law or practice. See G. Goodwin-Gill, *The Refugee in International Law* 103-104, 121-122 (1983); Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 Emory J. Int'l L. 43, 46 (1990). For example, Article 14(1) of the Universal Declaration of Human Rights, U.N. Doc. A/811 (1948), states only that "everyone has the right to *seek* and to enjoy in other countries asylum from persecution" (emphasis added). Proposals to substitute "to be granted" for "to enjoy" were rejected, because "[c]ontemporary opinion held that to grant asylum to refugees within its territory was the sovereign right of every state, while the corresponding duty was that of respect for that asylum by all other states." See Goodwin-Gill, *supra*, at 104.

chooses to grant it." 480 U.S. at 443. If anything was anomalous, the Court continued, it was the government's argument "to restrict its discretion to a narrow class of aliens." *Id.* at 444. But the Court responded by again emphasizing that "although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum." *Id.* at 444-445.

The court of appeals' notion that the Attorney General has only a "limited role" and "limited discretion" in asylum cases is incompatible with the foregoing description of Section 208(a) in every respect. Under the court of appeals' view, a refugee *would* "have a right to remain in the United States" unless the basis for the Attorney General's denial of asylum fell within the court of appeals' "limited" (yet undefined) category of permissible grounds, which specifically excludes the Nation's opposition to terrorism and other foreign policy factors; Section 208(a) therefore *would* "restrict [the government's] discretion to a narrow class of aliens"; and with respect to aliens falling outside that class, Congress would *not* have authorized the Attorney General "to determine which, if any, eligible refugees should be denied asylum." 480 U.S. at 444-445. The result would be to reintroduce the very anomaly the Court eliminated in *Cardoza-Fonseca*, by affording many refugees a right to obtain the broader relief of asylum under a standard of eligibility less stringent than that governing withholding of deportation.

c. The limitations the court of appeals placed on the Attorney General's discretion also conflict with other decisions of this Court recognizing that asylum policies, and immigration policies generally, are inextricably interwoven with the Nation's foreign policy interests. In *Abudu*, which likewise concerned the denial of reopening in the asylum context, the Court held that the reasons for deference to agency decisions apply with particular force under the immigration laws, because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations." 485 U.S. at 110.

Abudu is but the latest of this Court's decisions recognizing that "any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952), and that " 'the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' " *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)); accord *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101-102 n.21 (1976); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). Consistent with *Abudu* and its antecedents, other courts of appeals, in contrast to the court below, have made clear that foreign policy concerns are properly associated with asylum decisions.[12] Thus, the Second Circuit's holding that the Attorney General must "insulate" his discretionary asylum determinations from the foreign policy context in which they arise, Pet. App. 19a, represents a radical departure from established practice and precedent under the Immigration and Nationality Act.

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[12] See *Alvarez-Flores*, v. *INS*, 909 F.2d 1, 4 n.1 (1st Cir. 1990) ("connection of asylum and deportation to issues of foreign policy may counsel special deference to INS decisions"); *M.A.* v. *INS*, 899 F.2d 304, 313-314 (4th Cir. 1990) (en banc) (deferring to INS application of Section 208(a) because "numerous Supreme Court decisions recognize the intimate connection between immigration decisions and foreign policy"); *Kashani* v. *Nelson*, 793 F.2d 818, 827-828 (7th Cir.) ("District Director's decision whether to grant an asylum request involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the politcal branches of the government"), cert. denied, 479 U.S. 1006 (1986).

3. *The Legislative History Of Section 208(a) Strongly Supports The Attorney General's Broad Discretion To Consider Anti-Terrorism And Foreign Policy Concerns In Asylum Cases*

In fashioning limitations on the Attorney General's discretion that appear nowhere in the text of Section 208(a), the court of appeals relied entirely on what is regard as the "spirit" of the Refugee Act of 1980, Pet. App. 25a, based on inferences it drew from the Act's legislative history. See *id.* at 20a-21a, 23a-24a. But as this Court has said with specific reference to the Refugee Act, there is a "strong presumption that Congress expresses its intent through the language it chooses," and the plain import of that language (here, its grant of unqualified discretion to the Attorney General) can be overcome only by finding a "clearly expressed legislative intention" to the contrary. *Cardoza-Fonseca*, 480 U.S. at 432 n.12. That standard is not met here even under the court of appeals' own reading of the legislative history, which the court found to contain "some ambiguity" on the issue. Pet. App. 24a. In any event, the court of appeals seriously misunderstood the background of the Refugee Act of 1980, which in fact strongly supports the Attorney General's construction.

Congress enacted Section 208(a) in order to "establish[] for the first time a provision in Federal law specifically relating to asylum." *Stevic*, 467 U.S. at 426 n.20 (quoting H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979)). Prior to 1980, asylum was available to persons in the United States only under regulations issued pursuant to the Attorney General's parole authority under Section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), and his general authority under Section 103, 8 U.S.C. 1103, to administer the Act. *Stevic*, 467 U.S. at 426 n.20; *Cardoza-Fonseca*, 480 U.S. at 427 & n.4, 433 & n.14, 435 n.17. Then, as now, the parole provision of the Act authorized the Attorney General, "in his discretion," to admit aliens "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."

The court of appeals acknowledged that parole was the "primary vehicle" for granting asylum prior to 1980, and that parole was "wholly discretionary" with the Attorney General, thereby allowing him to consider the Nation's foreign policy interests. Pet. App. 18a-19a; *id.* at 21a (Attorney General had "unlimited discretion" prior to 1980); see *Jean* v. *Nelson*, 472 U.S. 846, 855 (1985). But the court believed that the Refugee Act greatly circumscribed the Attorney General's discretion and prevented the "government's political and foreign policy interests"—which it termed "improper factors"—from "influencing" his asylum decisions. Pet. App. 18a, 26a. There is no basis for that conclusion in the text of Section 208(a): like Section 212(d)(5), it commits the granting of relief to the "discretion" of the Attorney General, without qualification. Nor is there any suggestion in the legislative history that Congress intended to narrow the scope of the Attorney General's discretion under Section 208(a), as compared with that he previously exercised under Section 212(d)(5). To the contrary, the Senate Report states that "[t]he substantive standard is not changed." See S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979) (quoted in *Cardoza-Fonseca*, 480 U.S. at 435 n.16).[13]

The court of appeals found it significant that eligibility for asylum is established, through the definition of the term "refugee," in "politically neutral terms." Pet. App. 21a. The court ignored the fact that Congress did not enact into law any standards to control the Attorney General's exercise of his discretion to decide who, among the eligible applicants, will actually be granted asylum. Furthermore, the legislative history discussed in the materials cited by the court of appeals did not even involve Section

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[13] Accord *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71-72 (1979) (testimony of David Martin, State Dep't Legal Adviser's Office) [hereinafter *1979 House Foreign Affairs Hearings*].

208(a).[14] Rather, it concerned Congress's removal of the prior ideological and geographical restrictions on eligibility for conditional entry of aliens from *outside* the United States under former Section 203(a)(7) of the Act, see 8 U.S.C. 1153(a)(7)(A)(i) (1976), which could be granted only to aliens from Communist countries or the Middle East. In the Refugee Act, Congress replaced Section 203(a)(7) with Section 207, which broadly provides for admission of "refugees" from outside the United States, subject to flexible numerical limitations, and permits the Attorney General, in his "discretion," to admit such a refugee. See pages 20-21, *supra*.[15]

As under Section 208(a), the fact that Congress, by its definition of the term "refugee," removed the ideological and geographical restrictions on the aliens who are *eligible* for the exercise of the Attorney General's discretion under Section 207 does not support the court of appeals' far different and more sweeping proposition that Congress imposed strict limitations on the authority of the Attorney General to decide who among the eligible refugees will be admitted—and, in particular, that Congress precluded all consideration of anti-terrorism and other foreign policy concerns. As we have explained (see page 21, *supra*), that proposition cannot be squared with the text of Section 207 itself, which specifically identifies the "foreign policy interests of the United States" as a

[14] See Pet. App. 21a (citing *Stevic*, 467 U.S. at 425-427; S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); and Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 36 (1981)).

[15] Section 207, as added in 1980, also was intended to largely supplant the Attorney General's invocation of his parole authority to admit aliens who were not covered by the special conditional entry provisions under the prior Section 203(a)(7) for aliens from Communist countries or the Middle East. See 8 U.S.C. 1182(d)(5)(B). The parole power had been used to admit refugees from Hungary after the 1956 uprising, to admit more than 600,000 persons from Cuba since 1965, and to admit refugees from Indochina in the mid-1970s. See H.R. Rep. No. 608, *supra*, at 3-5; S. Rep. No. 256, *supra*, at 19; H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20-21 (1980).

relevant consideration in the admission of refugees. 8 U.S.C. 1157(e)(6).

Furthermore, the court of appeals' gloss on Section 208(a) cannot be squared with repeated references in the legislative history to the past practice and continued propriety of taking foreign policy considerations into account in the Nation's treatment of refugees. For example, the Chairman of the House Committee on Foreign Affairs stated that "the determination of the numbers and kinds of refugees to be admitted to the United States are issues involving U.S. foreign policy considerations," H.R. Rep. No. 608, *supra*, at 8,[16] and the Senate Report recites the requirement that the impact on "U.S. foreign policy interests" be considered in the consultation procedure regarding the admission of refugees. S. Rep. No. 256, *supra*, at 7; see also *id.* at 6 (refugees may be admitted "to fulfill foreign policy interests"). Similar views were expressed by the Attorney General, the State Department's Coordinator for Refugee Affairs, individual Members of Congress, and witnesses representing private organizations.[17]

[16] See also 126 Cong. Rec. 4503 (1980) (remarks of Rep. Zablocki) ("The conference report in my view successfully balances the foreign policy and domestic aspects of the U.S. refugee program. * * * U.S. involvement in refugee activities is first and foremost a matter of foreign policy.").

[17] See, *e.g.*, *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 24-25, 34 (1979) (Attorney General Bell) ("I operate on the theory that this is almost like a foreign policy matter, refugees. It usually has something to do with, or is rooted in, foreign policy. * * * When I first became Attorney General, different people would call on me and ask me to admit refugees. I said I can't be operating on an ad hoc basis, because this is foreign policy."); *The Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1, 37 (1979) (Sen. Kennedy) (refugees "touch at the heart of America's foreign policy," and although humanitarian concerns should be most important in refugee programs, "there are national policy factors as well"); *id.* at 9 (Refugee Coordinator Clark) ("refugee programs are an important element in our foreign

Finally, the restrictions created by the court of appeals ignore the fact that Congress specifically rejected the Senate proposal to make the granting of asylum mandatory upon an appropriate showing of persecution, and instead adopted the House provision committing that decision to the Attorney General's discretion, without any statutory qualifications. See *Cardoza-Fonseca*, 480 U.S. at 441-442. Thus, as Judge Lumbard observed, "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." Pet. App. 36a.

4. *The Court Of Appeals Should Have Deferred To The Attorney General's Reasonable Interpretation Of Section 208(a)*

If there were any remaining doubt about the legitimacy of the factors the Attorney General considered, the court of appeals should have deferred to what is, at the very least, a reasonable construction of Section 208(a) by the Attorney General, the official charged with administering the Act. See *Cardoza-Fonseca*, 480 U.S. at 445-446 & n.29; *PBGC* v. *LTV, Corp.*, 110 S. Ct. 2668, 2676-2677 (1990). Far from doing so, however, the court below expressly deferred to inferences it drew from prior decisions of the *BIA* (which did not involve the question presented here). Pet. App. 24a-25a. This error, which infects other aspects of the court of appeals' opinion as well,[18] stands the principle of deference on its head, be-

policy"); *1979 House Foreign Affairs Hearings* 50 (Refugee Coordinator Clark) ("refugee problems unfortunately have become a permanent part of the world in which we must fashion our foreign policy"); *id.* at 84 (representative of Lawyers Committee for Civil Rights Under Law) (although humanitarian concerns should "predominate" in admitting refugees, "it is a foreign policy issue and a foreign policy problem"); 125 Cong. Rec. 23,238 (1979) (Sen. Javits) ("it is very clear that this is a matter distinctly, very heavily, of foreign relations").

[18] See also Pet. App. 14a (faulting the Attorney General for taking a different view of the facts than the BIA and for deferring to the BIA, rather than the Attorney General, regarding the circumstances that warrant reopening); *id.* at 28a (criticizing the

cause as Judge Lumbard observed, "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a; cf. *Martin* v. *OSHRC*, 111 S. Ct. 1171 (1991).

The reasons for deferring to the Attorney General's construction are especially compelling here, because the court of appeals' contrary construction would fundamentally distort the asylum process. It would allow the Attorney General to deny asylum for lesser reasons of "administrative fairness and efficiency," Pet. App. 24a, but not for far weightier reasons of national security or foreign relations. And it would undermine the fairness of the Nation's immigration laws (and the appearance of such fairness) by conferring special humanitarian relief on terrorists and convicted criminals who enter the United States unlawfully, while thousands of refugees and others seeking to enter the United States lawfully must wait their turn abroad. Furthermore, if the United States may not refuse asylum to aliens who have committed acts of terrorism against other nations, the credibility of this Nation's efforts to combat terrorism will be substantially undermined, and other nations may respond by extending asylum to Americans who commit terrorist acts here.

Finally, the effect of the court of appeals' newly minted limitations is to confer a correlative right on a refugee to receive asylum whenever the grounds the Attorney General wishes to invoke are not among those the courts would find acceptable. That curious result would depart from international law and practice, under which a refugee does *not* have a right to be admitted to and remain in a particular country. See page 25 and note 11, *supra*. If such limitations are to be imposed on the sovereign power of the United States (through the Executive Branch) to deny asylum, they should be the product of negotiations, mutual undertakings, and reciprocity among Nations—and of a considered decision by the political

Attorney General's invocation of his authority to review the BIA's decisions in this case).

Branches of this Nation in that process—not judicially fashioned standards.[19]

B. The Attorney General Properly Concluded On The Uncontradicted Record That Respondent Would Be Ineligible For Withholding Of Deportation Under Either Of Two Statutory Exclusions From That Relief

1. *The Attorney General May Deny Reopening Where The Existing Record Shows That The Alien Falls Within A Statutory Exclusion From Eligibility For Withholding Of Deportation*

The Attorney General also properly declined to reopen the proceedings to the extent respondent sought to apply for withholding of deportation to the United Kingdom, because he determined that even if respondent were able to show that he satisfied the basic requirements in Section 243(h)(1), he would be excluded from eligibility. Section 243(h)(1) provides that the Attorney General shall not deport an alien to a country if the "alien's life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion" in that country. 8 U.S.C. 1253(h)(1). This prohibition "shall not apply," however, if the Attorney General determines that any of four grounds set forth in Section 243(h)(2) are present. In light of respondent's past criminal conduct and involvement with the PIRA, the Attorney General reasonably determined that respondent is excluded from eligibility on two such grounds: (1) there are "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside the United States prior to [his] arrival * * * in the United States," 8 U.S.C. 1253(h)(2)(C); and (2) respondent "assisted or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion," 8 U.S.C. 1253(h)(2)(A). See Pet. App. 83a-91a.

[19] The court of appeals also faulted the Attorney General for citing respondent's prior waiver of asylum as a factor supporting the discretionary denial of respondent's motion to reopen the proceedings to permit him to apply for asylum. Pet. App. 26a. But even if the court of appeals were correct that the waiver is not sufficient in itself to support denial of reopening (see *id.* at 27a-28a), an alien's affirmative waiver of asylum at an earlier stage in the proceedings (as distinguished from a mere failure to apply for that relief) is at minimum a relevant factor for the Attorney General to consider in deciding, in his discretion, whether to reopen the proceedings to permit a belated application.

The court of appeals did not disagree with the Attorney General's interpretation or application of the relevant statutory provisions; it did not reach those questions because it concluded that the Attorney General could not deny withholding of deportation in this case without a hearing. Pet. App. 15a-17a. Specifically, the court held that where an alien establishes a prima facie case of entitlement and introduces previously unavailable, material evidence, "the attorney general simply has no discretion" to deny reopening on the ground that the alien would be ineligible for relief, because in doing so he would be proceeding "without the benefit of a record." *Id.* at 16a-17a.

The court of appeals' reasoning is flawed in two critical respects. First, as we explain in Point II(B), *infra*, respondent did *not* produce previously unavailable, material evidence of an increased likelihood of persecution in the United Kingdom between September 1986 and December 1987 that might have supported a favorable exercise of discretion to reopen the proceedings in order to permit respondent to apply for withholding of deportation.[20] Second, the Attorney General did *not* find respondent ineligible for withholding of deportation "without the benefit of a record." The transcript of respondent's testimony at the district court hearing in the extradition proceedings (see note 2, *supra*), in which he admitted the essential bases for the Attorney General's finding of ineligibility, was part of the record in these proceedings. See J.A. 109-190; C.A. App. 712-943.

[20] Moreover, neither the Attorney General nor the BIA found that respondent had made a prima facie showing of eligibility for withholding of deportation. See note 5, *supra*.

Where, as here, the record already developed in the case establishes a reasonable basis for concluding that the motion is not meritorious—whether because the alien does not satisfy a basic eligibility requirement or, as here, because an exclusion renders him ineligible—it is entirely appropriate for the Attorney General to deny reopening. See *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"). The court of appeals read *Abudu* to foreclose that approach here: it believed that the Attorney General's power to deny reopening based on factors other than the movant's failure to establish a prima facie case or the lack of new evidence is limited to cases in which the ultimate relief sought is discretionary. Pet. App. 16a. This Court did not so hold in *Abudu;* it stated only that there are "at least" three independent grounds on which the BIA may deny a motion to reopen, 485 U.S. at 104, thereby contemplating the possible existence of others as well. This case involves another such ground: a determination by the Attorney General that the undisputed facts in the existing record render the alien ineligible for relief.

In fact, this case is closely analogous to the situation, cited in *Abudu*, in which a motion to reopen may be denied if the alien fails to establish a prima facie case of eligibility for the underlying relief, because here the Attorney General determined that respondent likewise fell outside the class of aliens to whom Section 243(h) affords relief. 485 U.S. at 104. In each instance, there is no genuine issue of *material* fact concerning a dispositive basis for rejecting the claim, and reopening therefore may be denied without further proceedings, including an evidentiary hearing. Cf. Fed. R. Civ. P. 56(e).[21] Furthermore, quite aside from the language

[21] The analogy to summary judgment procedures would remain apt even if the statutory exclusions from eligibility for withholding of deportation under Section 243(h)(2) were regarded as in the nature of "affirmative defenses" on which the government bears the burden of proof. Summary judgment may be entered in favor of the defendant on an affirmative defense. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 348 (1971); 6 (Pt. 2) J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 56.17[4] (2d ed. 1988).

of the Court's opinion in *Abudu*, nothing in the regulations governing motions to reopen—under which *Abudu* and its predecessors arose—prohibited the Attorney General from denying respondent's motion to reopen, once he determined that the undisputed facts in the existing record rendered respondent ineligible for withholding of deportation. In this context as in all others, the regulations commit the decision whether to grant the motion to reopen to the discretion of the BIA (or the Attorney General). See pages 16-17, *supra.*

The Attorney General did not abuse his discretion here in denying relief without a hearing. That course was especially warranted with respect to the determination under Section 243(h)(2)(C) that there are "serious reasons for considering" that respondent has committed a serious nonpolitical crime outside the United States. Such a determination is essentially a finding of probable cause, *McMullen* v. *INS*, 788 F.2d 591, 598 n.2, 599 (9th Cir. 1986); cf. *U.N. High Commissioner's Handbook* 35 (para. 149), which is typically made without an adversarial hearing. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119-125 (1975).

2. *The Attorney General Did Not Abuse His Discretion In Concluding That The Evidence In The Record Showed That Respondent Would Be Excluded From Eligibility For Withholding Of Deportation*

Because the court of appeals held that a hearing is necessary, it did not decide whether, if the Attorney General could resolve the issue on the *existing* record, he permissibly determined that respondent is statutorily excluded from eligibility for withholding of deportation. In our view, however, the Court should not remand to the court of appeals to address that question. These pro-

tracted proceedings should be brought to a close now. The correctness of the Attorney General's determination is properly before the Court and, as we shall now explain, it is amply supported in law and fact. Alternatively, the Court might choose not to review the Attorney General's determination on the merits, and instead sustain his denial of the motion to reopen on the independent ground that (as we explain in Point II, *infra*) the only changed circumstance on which respondent relied to justify reopening the proceedings—the enactment of a new Extradition Act in *Ireland* in December 1987—was totally immaterial to any claim by respondent for withholding of his deportation to the *United Kingdom*.

a. If the Court chooses to review the Attorney General's determination that respondent is excluded from eligibility for withholding of deportation, a threshold question arises concerning the proper standard of judicial review. In *Abudu*, the Court held that the abuse-of-discretion standard applies to review of the BIA's denial of reopening on the ground that the alien (1) did not identify new evidence or changed circumstances, or (2) should be denied underlying relief that is itself discretionary. 485 U.S. at 104-111. The Court did not decide whether the same standard applies where reopening was denied on the ground that the alien did not make a prima facie showing of eligibility for the underlying relief. *Id.* at 104. In our view, the courts should apply the abuse-of-discretion standard in reviewing all aspects of a decision denying a motion to reopen.

Application of a unitary standard of review is strongly supported by this Court's subsequent decisions in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990), which held that the abuse-of-discretion standard governs appellate review of both legal and factual aspects of district court determinations under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1), that the position of the United States was not substantially justified, and district court orders imposing sanctions under Fed. R. Civ. P.

11. In both contexts, the Court reasoned that there is a close relationship between questions of fact and law; the district court is more familiar with the underlying proceedings and the parties' litigating posture; and interests of judicial economy warrant deference to the district court's determinations. 487 U.S. at 559-563; 110 S. Ct. at 2459-2461.

Similar considerations support a unitary abuse-of-discretion standard of review in the present setting. First, agency officials who preside over deportation proceedings are in a better position than reviewing courts to evaluate the relationship of a motion to reopen to the issues involved in the principal proceedings. Second, reopening of deportation proceedings is governed by regulations that commit the decision to the agency's discretion in all circumstances. Third, a decision denying reopening may be based on several overlapping grounds, and it would be cumbersome for a reviewing court to carve it up into separate pieces for purposes of the standard of review. Fourth, the "strong public interest in bringing litigation to a close * * * promptly," upon which the Court relied in *Abudu* in prescribing a deferential standard of review for certain denials of reopening, 485 U.S. at 107, applies to such denials across the board. And fifth, the reasons for giving special deference to agency decisions on motions to reopen apply with even greater force in the INS context, because sensitive political and foreign relations interests are often implicated. 485 U.S. at 110. There are no grounds under the foregoing principles for overturning the Attorney General's considered judgment that respondent is excluded from eligibility for withholding of deportation.

b. The Attorney General first found respondent ineligible under Section 243(h)(2)(C). Deference to the Attorney General's judgment is especially warranted under that provision, because, as we have explained, it excludes an alien from eligibility if "the Attorney General determines" that "there are serious reasons for considering" that he has committed a serious nonpolitical crime. This formulation (as opposed to simply that the

alien has committed a nonpolitical crime) emphasizes both that the determination is for the Attorney General to make and that his *characterization* of the conduct is critical. See *Pierce* v. *Underwood*, 487 U.S. at 559; cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

The background of Section 243(h) reinforces this conclusion. The Conference Report on the Refugee Act of 1980 states that Section 243 "is based directly upon the language of the Protocol [Relating to the Status of Refugees] and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, *supra*, at 20.[22] The exclusion in paragraph (C), at issue here, is drawn directly from a virtually identical exclusion in Article 1(F)(b) of the Convention, 19 U.S.T. 6264.

As the Attorney General noted, what constitutes a serious nonpolitical crime "is not susceptible of rigid definition." Pet. App. 83a. The *U.N. High Commissioner's Handbook* states (at 35 (para. 149)) that the competence to decide whether the exclusions from eligibility for *nonrefoulement* apply rests with the contracting State in whose territory the alien seeks recognition of his refugee status, and it stresses that that State need not have firm proof, only "serious reasons for considering," that a ground for exclusion exists. "In practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is evidently one in which political considerations will be involved." Goodwin-Gill, *supra*, at 35 (quoted by the Attorney General, Pet. App. 83a-84a). The origins of Section 243(h)(2)(C) thus heighten the degree of deference owed to the Attorney General's interpretation and application of Section 243(h) under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). See *Cardoza-Fonseca*, 480 U.S. at 448 ("[t]here is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication," in which "the

[22] Actually, as we explain in the text, Section 243(h) is based on provisions of the Convention, not the Protocol.

courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program"). The Attorney General's decision here rests on a reasonable interpretation of Section 243(h)(2)(C).

Although neither Section 243 nor the Convention defines a "nonpolitical crime," the *U.N. High Commissioner's Handbook* (at 36 (para. 152)) identifies several relevant factors: (1) whether the crime was "committed out of genuine political motives and not merely for personal reasons or gains"; (2) whether there is "a close and direct causal link between the crime committed and its alleged political purpose and object"; (3) whether the political element of the offense "outweigh[s] its common-law character"; (4) whether "the acts committed are grossly out of proportion to the alleged objective"; and (5) whether "it involves acts of an atrocious nature."[24] See also *McMullen* v. *INS*, 788 F.2d 591, 595-597 (9th Cir. 1986) (considering similar factors); Goodwin-Gill, *supra*, at 61. In light of these factors, there is no basis for overturning the Attorney General's determination that he had "serious reasons for considering" that respondent's conduct constituted serious nonpolitical crimes. Indeed, as Judge Lumbard observed, "the Attorney General's determination that [respondent] failed the test in subsection (C) is a model of a reasoned decision based on the record." Pet. App. 43a.

Respondent is a member of the PIRA, which is officially classified by the United States Government as a terrorist organization. U.S. Dep't of State, *Patterns of Global Terrorism: 1988*, at 33-34, 74-75 (1989); Pet. App. 84a-85a & n.45; see *McMullen*, 788 F.2d at 597 ("the PIRA is unquestionably a 'terrorist' organization"); *Adams* v. *Baker*, 909 F.2d 643, 648-649 (1st Cir. 1990). As the Attorney General pointed out, the "PIRA's

[23] The *Handbook* does not have the force of law and does not bind the Attorney General in interpreting the provisions of the Act. But the *Handbook* furnishes guidance in construing the Protocol, and therefore may properly inform the interpretation of the Act. *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

random acts of violence against the ordinary citizens of Northern Ireland and elsewhere" are "exhaustively documented" in the record in *McMullen*. Pet. App. 86a n.46 (quoting 788 F.2d at 598). There, the BIA found that "the PIRA is a clandestine, terrorist organization" that has engaged in "attacks on both government civilian institutions and military installations, random violence against innocent civilian populations through indiscriminate bombing campaigns, [and] the murder or maiming of targeted individuals for political reasons based on their public opposition to the PIRA," and that the PIRA's "operations have been funded, in part, through the commission of thousands of armed robberies." Pet. App. 86a n.46 (quoting *In re McMullen*, Interim Dec. 2967 (BIA May 25, 1984), slip op. 4-5).

Traditional principles of conspiracy law, see *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946), are sufficient to associate respondent with these actions of the PIRA for purposes of determining if there are "serious grounds for considering" that he committed serious nonpolitical crimes. Pet. App. 85a-86a & n.46; see *McMullen*, 788 F.2d at 599. Respondent was an officer of the PIRA, and he admitted that he was responsible for distributing arms, gathering ammunition and training other PIRA members. Pet. App. 89a; J.A. 147, 153. He also acknowledged that the PIRA had planted explosives that resulted in the death of civilians (although he insisted that the PIRA's policy was to attempt to avoid civilian casualties), J.A. 139-140, and he was convicted in 1974 for transporting 80 pounds of explosives for the PIRA. Pet. App. 46a-47a; J.A. 156-157. The Attorney General also properly found "serious reasons for considering" that respondent had committed a serious nonpolitical crime specifically based on the events of May 2, 1980, for which respondent was convicted of murder and related offenses. Those events included hijacking a van and holding its driver captive, seizing a family-occupied house in a residential neighborhood, attacking a car full of British soldiers, and killing a British officer. *Id.* at 88a.

Finally, the Attorney General had a firm basis for concluding that the common-law character of respondent's offenses outweighed any "political" element they might have. Respondent's crimes were not converted into "political" crimes simply because they might have been politically motivated. As the provisions of the *U.N. High Commissioner's Handbook* quoted above make clear, political motivation is only one factor to be considered.[24] Here, other factors predominated. Respondent's actions not only involved acts of an atrocious nature, but they also were out of proportion to the political objective alleged and did not have a close and direct causal link to their alleged political object. Compare *Ornelas* v. *Ruiz*, 161 U.S. 502, 511 (1896) (magistrate justified in not applying political offense exception in extradition treaty, "in view of the character of the foray, the mode

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[24] Consistent with this view, courts and commentators have concluded that a distinction should be drawn between contemporary political action, which may include protected political offenses, and terrorism, even if the terrorism was politically motivated. *McMullen*, 788 F.2d at 597; *Eain* v. *Wilkes*, 641 F.2d 504, 519 (7th Cir.), cert. denied, 454 U.S. 894 (1981); Thompson, *The Evolution of the Political Offense Exception in an Age of Modern Political Violence*, 9 Yale J. World Pub. Ord. 315, 338-341 (1983); but cf. *Quinn* v. *Robinson*, 783 F.2d 776, 804-805 (9th Cir.), cert. denied, 479 U.S. 882 (1986).

In *Eain*, the court, construing the extradition treaty between the United States and Israel, rejected the argument that a member of the Palestine Liberation Organization should not be extradited to Israel on charges of setting a bomb in a busy market area of an Israeli city, killing two young boys and injuring thirty other people, because any crimes were "political offenses" and therefore not grounds for extradition under the treaty. The court noted that "[m]odern international terrorism is a phenomenon apart from the world's experience," and held that Eain's political motivation was insufficient to render his actions political offenses, because terrorist activity seeks "the destruction of a political system by undermining the social foundation of the government." 641 F.2d at 519-521. If the rule were otherwise, the court explained, "nothing would prevent an influx of terrorists seeking a safe haven in America" and seeking to "avoid having to answer to anyone anywhere for their crimes." *Id.* at 520.

of attack, the persons killed or captured, and the kind of property taken or destroyed").

This case closely resembles *McMullen*, where the Ninth Circuit held that the activities of a PIRA member were "serious nonpolitical crimes" within the meaning of Section 243(h)(2)(C). McMullen had participated in the bombing of barracks and other PIRA activities. The court rejected his argument that he was not excluded under Section 243(h)(2)(C) because the only specific evidence linked him to actions against military installations, not civilians. 788 F.2d at 599. The court acknowledged a distinction between "terrorist acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens," *id.* at 597, but found that the PIRA's terrorist activities were not limited to military targets. Moreover, it concluded that "the PIRA's random acts of violence against ordinary citizens of Northern Ireland and elsewhere * * * are not sufficiently linked to their political objective and, by virtue of their primary targets, [are] so barbarous, atrocious, and disproportionate to their political objectives that they constitute 'serious nonpolitical crimes' for purposes of section 243(h)(2)(C) and the Convention." *Id.* at 598. Indeed, the court concluded that such activities "were directed solely at bringing about social chaos, with the eventual demise of the State intended only as an indirect result." 788 F.2d at 597. McMullen was therefore excluded from eligibility because of his "willing and material involvement in a terrorist organization that carried out acts of violence against civilians, his assistance in training members of that organization and procuring arms shipments." *Id.* at 599. So too here.[25]

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[25] Although terrorist activities solely affecting the military might, in some circumstances, also constitute "serious nonpolitical crimes," see Pet. App. 124a, Attorney General Thornburgh did not decide that question here. *Id.* at 88a n.48a.

As we explained in our reply brief (at 7-8) at the petition stage, Judge Sprizzo's decision denying the application for a warrant to extradite respondent to the United Kingdom because, in his view, respondent's conduct of May 2, 1980, fell within the treaty exception

c. Respondent's active role in the PIRA also was sufficient to support the Attorney General's determination that he is excluded from eligibility for withholding of deportation because he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion." 8 U.S.C. 1253(h)(2)(A). As noted above (see page 42, *supra*), the BIA concluded in *McMullen*, and the Attorney General reached the same conclusion in this case, that the PIRA is an organization that has killed or attempted to kill those who politically oppose its activities. According to his own testimony in the extradition proceedings, respondent's responsibilities with the PIRA included "distribution of arms, gathering ammunition," J.A. 147, and training other PIRA members, J.A. 153. This involvement constitutes assistance in the PIRA's persecution of persons on account of political opinion. See *McMullen*, 788 F.2d at 600 (Goodwin, J., specially concurring).

II. THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETION IN CONCLUDING THAT RESPONDENT DID NOT IN ANY EVENT IDENTIFY CHANGED CIRCUMSTANCES OR NEW AND MATERIAL EVIDENCE WARRANTING THE EXTRAORDINARY REMEDY OF REOPENING

Even if, contrary to our submission in Point I, respondent would have been granted asylum or withholding of deportation if he had applied in a timely manner, the Attorney General did not abuse his discretion in concluding that respondent did not identify changed circumstances or new evidence that warranted reopening to permit a belated application for that relief.

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for offenses of a "political character" (see note 1, *supra*) did not bar the Attorney General from finding respondent excluded from eligibility for withholding of deportation under Section 243(h)(2)(C) based on a determination that his past conduct generally gave rise to serious reasons for "considering" that he committed serious nonpolitical crimes. Accord *McMullen* v. *INS*, 788 F.2d at 596-597; Pet. App. 44a n.8 (Lumbard, J., dissenting); cf. *McCleskey* v. *Zant*, No. 89-7024 (Apr. 16, 1991), slip op. 10.

A. The court of appeals believed reopening was required in light of Attorney General Meese's rejection of respondent's designation of Ireland as the country of deportation and the enactment of the 1987 Extradition Act in the Republic of Ireland. Pet. App. 12a-15a. In his brief in opposition (at 9-10, 16-17), respondent correctly points out that he did not rely on Attorney General Meese's decision when he sought reopening, see J.A. 58, 62-63, and he expressly disavows any reliance on that decision here as a justification for reopening.[26] Instead, as he did in the motion to reopen itself, respondent relies solely on the Irish Extradition Act, which implemented the European Convention on the Suppression of Terrorism by formally deleting certain crimes from the political offense exception. See page 6, *supra*.

The 1987 Extradition Act did not constitute newly discovered and material *evidence* that might have supported reopening under 8 C.F.R. 3.2, since it did not show the existence of persecution and therefore did not go to the merits of any claim for asylum or withholding of deportation. The court of appeals nevertheless believed the Irish Extradition Act furnished a "reasonable explanation" for respondent's failure to apply for asylum or withholding of deportation at an earlier date. Pet. App. 13a, 14a; see *Abudu*, 485 U.S. at 104-105. This holding was clearly wrong. The irrelevance of the new Act in Ireland follows *a fortiori* from Attorney General Meese's decision (with which Attorney General Thornburgh agreed) that respondent should be deported to the United Kingdom, not Ireland, Pet. App. 74a, 116a-130a—a decision that the court of appeals sustained, *id.* at 7a-9a, and that respondent did not challenge in this Court.

1. Withholding of deportation is "country-specific": it only bars deportation to a particular country, if the Attorney General determines that the alien's life or freedom would be threatened "in such country" for a prohibited reason. 8 U.S.C. 1253(h)(1). Respondent alleged that there was a likelihood that he would be persecuted in the United Kingdom and sought to avoid deportation to that country. The enactment of the 1987 Extradition Act in *Ireland* was utterly irrelevant to respondent's country-specific claim to withholding of his deportation to the *United Kingdom*. At the very least, the Attorney General did not abuse his discretion in so holding.

2. For similar reasons, the 1987 Irish Extradition Act had no bearing on the merits of respondent's asylum claim, which also was predicated on circumstances (alleged persecution) in the United Kingdom, not Ireland. Respondent contended that the Act was relevant because its passage rendered it more likely that he would be extradited to the United Kingdom if he was first deported to Ireland (as he originally requested). There are two flaws in this argument.

First, the Attorney General found that the 1987 Extradition Act did not constitute a material change in the law of extradition in Ireland. Pet. App. 70a-73a. He pointed out that on at least four separate occasions in the deportation proceedings themselves, the *respondent* had taken the position (when he was trying to convince the BIA to sustain the immigration judge's order that he be deported to Ireland) that, under pre-1987 decisions of the Irish Supreme Court narrowing the political offense exception, he would have been subject to extradition from Ireland to the United Kingdom. *Id.* at 70a-71a & n.25. In the Attorney General's view, the primary effect of the 1987 Extradition Act was to provide an express statutory basis for extradition in those circumstances. *Id.* at 71a. By the same token, the Attorney General pointed out that Section 8 of the 1987 Act (J.A. 105-106) provides for denial of extradition where there are substantial grounds for believing that it is sought for the purpose of persecution. Pet. App. 72a-73a & n.26. The upshot, the Attorney General concluded, was that the 1987 Act did not materially increase the likelihood that respondent would be extradited from Ireland to the United Kingdom. *Id.* at 73a. The

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[26] In any event, as we explain in the certiorari petition (at 23-24), Attorney General Thornburgh correctly ruled that Attorney General Meese's decision did not warrant reopening. Pet. App. 57a-58a, 67a-69a; see page 5, *supra*.

court of appeals did not dispute this assessment of the import of the 1987 Act.

Second, although a change in *United States* immigration law might have justified reopening of respondent's deportation proceedings if it altered the governing legal standards (cf. *Abudu*, 485 U.S. at 103 n.8), any change in *Irish* law wrought by the 1987 Extradition Act had no effect on the standards governing respondent's deportation or his eligibility for asylum—especially since he is to be deported to the United Kingdom, not Ireland. It therefore did not require reopening. Moreover, as the Attorney General pointed out, the 1987 Extradition Act simply gave effect to the European Convention, which Ireland had signed in February 1986, more than six months *before* respondent withdrew his asylum application and waived his right to apply for that relief. Pet. App. 67a-68a. Thus, even if the Attorney General would have been required to take a truly new and unforeseen development in Irish law into account in deciding whether to reopen the proceedings, he did not abuse his discretion in declining to do so here on the basis of the 1987 Extradition Act.

Reopening of deportation proceedings to permit an alien to apply for special relief he previously waived requires more than an explanation of the alien's motivations for his tactical choices; it requires a legally sufficient justification. A change in the legal climate in Ireland (even assuming a material change occurred here) simply does not meet that test. As Attorney General Thornburgh and Judge Lumbard explained, respondent is in the same position as a criminal defendant who pleaded guilty in the hope that the judge might impose a lenient sentence or on an understanding of the law that later proves erroneous. The defendant has no right to withdraw his plea in those circumstances, if it was voluntarily given on the basis of competent advice. Respondent likewise has no right to repudiate his waiver and have his case reopened. See Pet. App. 39a-41a, 81a & nn.39, 40 (citing *United States* v. *Broce*, 488 U.S. 563 (1989), and *Brady* v. *United States*, 397 U.S. 742, 757 (1970)).

B. When respondent filed his motion to reopen, he submitted various materials concerning conditions in Northern Ireland. See note 5, *supra*. But respondent relied on those materials only for purposes of attempting to establish a prima facie case of eligibility for asylum or withholding of deportation (based on a fear or likelihood of persecution in the United Kingdom) *if* the proceedings were reopened to permit him to apply for that relief. As a justification for the reopening itself, respondent relied solely on the 1987 Irish Extradition Act; he did not contend that the materials he submitted independently justified reopening on the theory that they constituted *new* evidence or showed an increased likelihood of persecution in December 1987, as compared with September 1986, when he waived his right to asylum and witholding of deportation. J.A. 57-58. In accordance with that position, respondent argued in his brief to the Attorney General (at 8, 12-13, 14, 15-18), in his brief to the Second Circuit (at 20-22, 28-29, 55-56, 58-60 & n.34, 67, 71 n.40), and in his brief in opposition in this Court (at 9-11, 12-14, 16-17) that the sole basis of his motion to reopen was the 1987 Irish Extradition Act, and that the documents he submitted with his motion would constitute a prima facie showing of eligibility for asylum and withholding of deportation if reopening was granted.

Because respondent has consistently disavowed reliance on the evidence of alleged persecution in the United Kingdom as an independent justification for reopening, there is no need for this Court to review that evidence to determine whether it satisfies the newly discovered evidence test for reopening. See *Abudu*, 485 U.S. at 110 (citing *Taylor* v. *Illinois*, 484 U.S. 400, 414 & n.18 (1988) (whether the evidence probably would change the outcome)). In any event, the Attorney General thoroughly examined the evidence respondent submitted, Pet. App. 74a-78a, and concluded that it would not warrant reopening because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence

that was presented." *Id.* at 75a. That reasoned determination by the Attorney General plainly did not constitute an abuse of his discretion.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Attorney General's order denying respondent's motion to reopen should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

2. Section 207 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1152, provides in relevant part:

§ 1157. Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e) of this section), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitanian concern to the United States in accordance with a determination made by the President after appropriate consultation.

* * * * *

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney

General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

* * * * *

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) of this section or with respect to the admission of refugees in response to an emergency refugee situation under subsection (b) of this section, the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a) of this section, a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b) of this section, that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

3. Section 208 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158, provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the

case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child of alien granted asylum

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

4. Section 243(a) and (h) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253(a) and (h), provides in relevant part:

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon non-acceptance by country

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may there-

after be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. * * *

* * * * *

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

5. 8 C.F.R. 3.2 provides in relevant part:

§ Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision.

Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

6. 8 C.F.R. 208.11 provides in pertinent part:

§ 208.11 Asylum requests after completion of exclusion or deportation hearing.

An alien may request that an exclusion or deportation proceeding be reopened pursuant to 8 CFR 103.5 or 8 CFR 242.22 respectively, on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

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